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No. 01-389

In the Supreme Court of the United States

JOAN H. COX, Individually, and as Widow and Personal Representative of the Estate of Brian J. Cox, deceased; and as Mother and Legal Guardian of Brian Justin-Tyler Cox, a minor,

Petitioner,

v.

COUNTY OF PRINCE WILLIAM; CHARLIE T. DEANE, Individually and as Chief, Prince William County Police Department; JAMES FORD, Individually and in his Official Capacity as a Police Officer; MARK J. HARMAN, Individually and in his Official Capacity as a Police Officer; ROBERT C. SHAUL, Individually and in his Official Capacity as a Police Officer,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
A. Introduction	1
B. As In *Abraham* And *Breen*, A Reasonable Juror Could Conclude That The Officers Used Excessive Force.	2
C. The Fourth Circuit's Decision Cannot Be Reconciled With *Abraham* And *Breen*.	5
CONCLUSION	9

TABLE OF AUTHORITIES

CASES Page

Abraham v. Raso, 183 F.3d 279 (3d Cir. 1999)..... *passim*
Alexis v. McDonald's Restaurants, Inc., 67 F.3d 341 (1st Cir. 1995)..... 6
Anderson v. Creighton, 483 U.S. 635 (1987)..... 7
Bazan v. Hidalgo County, 246 F.3d 481 (5th Cir. 2001)..... 3
Breen v. Garrison, 169 F.3d 152 (2d Cir. 1999).... 2, 5, 6
Graham v. Connor, 490 U.S. 386 (1989)..... *passim*
Harper v. Harris County, 21 F.3d 597 (5th Cir. 1994)..... 6
Hunter v. Bryant, 502 U.S. 224 (1991)..... 7
Johnson v. Jones, 515 U.S. 304 (1995)..... 9
Lambert v. City of Dumas, 187 F.3d 931 (8th Cir. 1999)..... 6
Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994)..... 4, 5
Saucier v. Katz, 121 S. Ct. 2151 (2001)..... 8
Scott v. Henrich, 39 F.3d 912 (9th Cir. 1994)..... 3
Sledd v. Lindsay, 102 F.3d 282 (7th Cir. 1996).... 4
Tennessee v. Garner, 471 U.S. 1 (1985)..... 7
Wilson v. Layne, 526 U.S. 603 (1999)..... 9

STATUTES AND RULES

42 U.S.C. § 1983 (West Supp. 2001)..... 8
Fed. R. Evid. 404(b)..... 3
Fed. R. Evid. 608(b)..... 3

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REPLY BRIEF FOR PETITIONER

A. Introduction

Respondents refuse to focus on the narrow issue presented by the petition—whether it is the judge or the jury who determines the objective reasonableness of an officer's conduct where reasonable minds could differ on that subject. Instead, respondents focus primarily on re-arguing their version of the events surrounding the killing of Mr. Cox. To the extent that respondents do address the issue raised in the

petition, their opposition serves only to highlight the conflict between the ruling below and decisions from other circuits regarding the proper decision-maker to determine the reasonableness of an officer's use of force. This is an important issue that affects every case involving allegations of use of excessive force by police. The Court should grant review to resolve the conflict over who decides whether an officer's conduct is reasonable where reasonable minds could differ—the jury, as the Second and Third Circuits have held, or the judge, as the court of appeals has permitted in the decision below.

B. As In *Abraham* And *Breen*, A Reasonable Juror Could Conclude That The Officers Used Excessive Force.

This case presents precisely the kind of situation in which "physical evidence together with inconsistencies in the officer's testimony raise[ ] credibility determinations that [can]not be made on summary judgment." *See* Br. in Opp. 12; *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999); *Breen v. Garrison*, 169 F.3d 152, 153 (2d Cir. 1999). Although respondents spend much of their brief arguing that the facts are undisputed, they acknowledge that the parties differ on some "significant" issues. *See* Br. in Opp. 5-8, 14. Indeed, given the facts—the officers themselves have admitted that Harman made physical contact with Mr. Cox's foot, a bruise was found on Mr. Cox's foot afterward, Mr. Cox had remained totally unresponsive to all police announcements and a barking police dog until Harman struck his foot, after which he awoke screaming, and the officers killed the only witness likely to contradict their testimony—it is difficult to imagine how any plaintiff would survive summary judgment without a surviving eyewitness in an excessive deadly force case if the evidence here is held insufficient as a matter of law to permit a reasonable jury to infer that the officers used unreasonable force.

Significantly, respondents do not dispute that the principles announced in *Abraham* and *Bazan v. Hidalgo County*, 246 F.3d 481, 492 (5th Cir. 2001), are applicable to this case. *See* Br. in Opp. 13-14. These decisions require a court to examine "the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably" in deadly force cases to " 'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify.' " *Abraham*, 183 F.3d at 294 (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)); *Bazan*, 246 F.3d at 492. Respondents' acceptance of these principles undermines their repeated complaints regarding the sufficiency of petitioner's proof, as respondents essentially acknowledge that the courts below were obliged to credit petitioner's view of the evidence. Br. in Opp. 14. This admission demonstrates that the issue decided by the court of appeals was parallel to that addressed by the Third Circuit in *Abraham*, although the courts reached very different conclusions.

To be sure, respondents have a different view of the facts, but this does not defeat the inference raised by petitioner's proof at the summary judgment stage that Officer Harman used excessive force in striking Mr. Cox's foot with enough force to cause a bruise. This inference is even more appropriate in light of the officers' inconsistent recollections and the fact that the jury would hear testimony detailing Harman's history of untruthfulness.[1] *See Bazan*, 246 F.3d at 492 (noting that the court must critically assess the evidence in deadly force cases "to decide whether the officer's

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[1] This testimony could be presented to the jury through cross-examination under Federal Rule of Evidence 608(b) or under Federal Rule of Evidence 404(b) to prove the County's knowledge of Harman's untruthful and violent nature.

testimony could reasonably be rejected at a trial" because the defendant "knows that *the only person likely to contradict him or her is beyond reach*") (emphasis in original); *Abraham*, 183 F.3d at 294 (same). The factual issues surrounding the credibility of the officers' testimony, the amount of force used, and the reasonableness of the force are the identical issues addressed by the Third and Second Circuits in *Abraham* and *Breen*, but, in contrast to those courts, which properly reserved these issues for the factfinder, the court of appeals here endorsed the district court's approach of deciding them all as a matter of law.

Respondents misdirect the relevant inquiry when they assert repeatedly that petitioner "concedes" that the officers were justified in killing her husband when he rose from the bed with a gun after the blow to his foot startled him from his sleep. Br. in Opp. 5, 8, 17. If the officers' conduct in striking Mr. Cox's foot is held unreasonable, the factfinder could well determine that the resulting use of deadly force, which was set in motion by the officers' initial use of excessive force, was itself unreasonable. Pet. 19 n.3. Respondents attempt to distinguish *Rowland v. Perry*, 41 F.3d 167 (4th Cir. 1994), and *Sledd v. Lindsay*, 102 F.3d 282 (7th Cir. 1996), but they fail to explain how the factual differences detract from the essential principle, applicable here, that the police may not unreasonably create a situation that then necessitates their use of excessive force. *Graham v. Connor*, 490 U.S. 386, 396 (1989), and its progeny do not permit respondents to concentrate only on that portion of the sequence of events that they regard as most readily defensible; rather, *Graham* instructed courts to examine the "totality of the circumstances" leading up to the use of deadly force.[2]

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[2] In an effort to show that the court below has reached results similar to the decisions in *Abraham* and *Breen*, respondents assert that *Rowland* "demonstrates that the Fourth Circuit will let an excessive force case go to

C. The Fourth Circuit's Decision Cannot Be Reconciled With *Abraham* And *Breen*.

The Fourth Circuit improperly removed the "reasonableness" inquiry from the jury, in stark contrast to the approach adopted by the Second and Third Circuits. *Compare* Pet. App. 10a (concluding, as a matter of law, that striking Cox was reasonable because Cox "remained unresponsive" to police commands), *with Abraham*, 183 F.3d at 290 ("since we lack a clearly defined rule for declaring when conduct is unreasonable in a specific context, we rely on the consensus required by a jury decision to help ensure that the ultimate legal judgment of 'reasonableness' is itself reasonable and widely shared"), *and Breen*, 169 F.3d at 153 ("The issue of excessive force also was for the jury, whose unique task it was to determine the amount of force used, the injuries suffered and the objective reasonableness of the officer's conduct.").

Respondents' effort to distinguish *Abraham* is belied by respondents' own admissions that the parties disagree as to the critical circumstances surrounding the striking and bruising of Mr. Cox's foot. Br. in Opp. 11, 14. Contrary to respondents' assertion, (Br. in Opp. 11), the context of those crucial moments before Harman struck Mr. Cox's foot is very much in dispute. Petitioner has adduced evidence that

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the jury when there is some evidence to support Plaintiff's version of a case . . . ." Br. in Opp. 15. In *Rowland*, however, the defendant officer essentially acknowledged that his version of the facts differed significantly from that of the victim in almost every respect, including whether the suspect attempted to give the lost money back to the woman who dropped it, whether the suspect initially ran from the officer, whether the officer or the suspect initiated the use of force, the nature of the suspect's resistance, the suspect's subsequent attempts to flee, and the amount of force used. *See Rowland*, 41 F.3d at 171-73. Here, of course, respondents' actions rendered the victim incapable of testifying. That does not mean that the reasonableness of the officers' conduct should be determined by the court rather than a jury.

Harman, only seconds after entering Mr. Cox's bedroom, grew impatient and struck the sleeping man with enough force to cause tissue damage, and contrary to accepted police procedure. Respondents claim that Mr. Cox's foot, if struck at all, was merely "tapped" lightly to rouse him. Br. in Opp. 6. A reasonable jury could well conclude that it was an unreasonable use of force to strike a man in his own home as he slept, posing no threat to the officers or others, when numerous reasonable alternatives were available to the officers to safely determine the identity of the man and his condition. *See Abraham*, 183 F.3d at 292; Pet. 9-10.

It is no answer for respondents to assert that their conduct was reasonable because the bruise that resulted was "small." Br. in Opp. 15. Under *Graham*, the reasonableness of the amount of force used must be analyzed under the "totality of the circumstances," 490 U.S. at 396, and it is well established that a bruise can constitute an injury sufficient to withstand summary judgment on an excessive force claim. *See Lambert v. City of Dumas*, 187 F.3d 931, 936 (8th Cir. 1999); *Alexis v. McDonald's Restaurants, Inc.*, 67 F.3d 341, 353 (1st Cir. 1995); *cf. Harper v. Harris County*, 21 F.3d 597, 600 (5th Cir. 1994)(declaring that "a plaintiff is no longer required to prove significant injury to assert a § 1983 Fourth Amendment excessive force case," but deciding case under prior law). The decisions in *Abraham* and *Breen*, as opposed to the ruling below, recognize that these determinations of reasonableness are best made by the jury. 183 F.3d at 290-94; 169 F.3d at 153.

The court of appeals here largely ignored the guidance of this Court in *Graham*, which was explored at length in the *Abraham* decision. The court of appeals did not mention or analyze a single factor that this Court identified in *Graham* as requiring "careful attention" in excessive force cases, *i.e.*, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade

arrest by flight." *Graham*, 490 U.S. at 396. In this regard, respondents' assertion that it is "irrelevant" whether the officers knew that Mr. Cox was the homeowner at the time of the incident is particularly revealing. Br. in Opp. 8. It shows that the officers were not considering any reasonable alternatives to their actions to protect an innocent homeowner who they knew might be in the house.

Respondents attempt to deal with *Graham* by jumping ahead in time to the moment when Mr. Cox raised the rifle from the bed. *See* Br. in Opp. 17, 20. This argument misses the point. During the relevant time period—the period when the police were faced with the sleeping Mr. Cox—a simple check of the unresponsive, unmoving man's hands would have revealed that the rifle was in the bed so that it could have been harmlessly removed. JA 553. The "cover and control" method, which was described by the retired Commissioner of the New York Police Department and other leading experts as the standard of care, also could have neutralized this threat. Pet. 9-10, 18-19; JA 550-53. On entering the bedroom, the officers were confronted with a static situation; nothing happened until Harman aggresively struck Mr. Cox's foot, setting in motion the tragic events that led to Mr. Cox's death. The court of appeals' lack of attention to these factors shows that it hardly reviewed the "totality of the circumstances," as directed by this Court and as the Third Circuit did in *Abraham*. Pet. App. 8a-11a; *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)); *Abraham*, 183 F.3d at 289, 291-92.

Respondents' failure to recognize the conflict among the circuits on the constitutional question stems at least in part from their confusion over the way in which that issue relates to the qualified immunity defense. For example, respondents, contend that the Third Circuit decision in *Abraham* "differs" from the decisions of this Court in *Hunter v. Bryant*, 502 U.S. 224 (1991), and *Anderson v. Creighton*, 483 U.S. 635 (1987).

Br. in Opp. 10 n.10. Those decisions, however, dealt with the qualified immunity defense to 42 U.S.C. § 1983 liability, which was never raised or addressed in *Abraham*. *Abraham* dealt solely with the constitutional issue of whether the amount of force that the officer used was reasonable. *See Abraham*, 183 F.3d at 287-96. Addressing the identical issue of "reasonableness" that the *Abraham* court decided should go to the jury, the court below specifically refrained from determining the qualified immunity questions and rested its decision solely on the basis that no constitutional violation had occurred (*i.e.*, that the officers use of force was reasonable as a matter of law). Pet. App. 4a n.*, 11a.

Similarly, respondents attempt to derive support from this Court's recent decision in *Saucier v. Katz*, 121 S. Ct. 2151 (2001), which clarified the qualified immunity inquiry. Br. in Opp. 17-18. Respondents' misunderstanding of *Saucier* and the framework for analyzing § 1983 claims where the qualified immunity defense is raised is apparent. Respondents confuse the requirement that a plaintiff show that the officers' conduct violated "clearly established" law with the constitutional inquiry at issue here.

This Court made clear in *Saucier* that the first step in the inquiry is to determine whether the facts, "taken in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a constitutional right." *Saucier*, 121 S. Ct. at 2156. If a violation can be discerned on a favorable view of the evidence, then the court is to consider "whether the right was clearly established." *Id.* This Court explained that "there is no doubt that *Graham v. Connor, supra,* clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." *Id.* The question whether respondents' use of force was unreasonable and excessive under this standard is the only issue decided below. The question whether respondents violated "clearly

established" law has not yet been reached. The error in respondents' attempted reliance on *Saucier* is exposed by the court of appeals' own statement that it was not deciding the issues addressed in this Court's decision. Pet App. 4a n.*, 11a.

Stripped of its rhetoric and sarcasm, respondents' position boils down to this: it was proper for the Fourth Circuit to decide that the officers' bruising blow to Mr. Cox's foot while he lay unresponsive, posing no threat, in his own bed was reasonable as a matter of law because Mr. Cox was unresponsive to police announcements. This position is both illogical and irreconcilable with decisions of other courts of appeals. The Second and Third Circuits, following this Court's lead in *Graham*, have determined that the jury is best suited to make the fact-sensitive reasonableness inquiry in this kind of case. Just as in *Johnson v. Jones*, 515 U.S. 304 (1995), *Wilson v. Layne*, 526 U.S. 603 (1999), and *Graham* itself, review should be granted to resolve a split in the lower courts and to address an important issue that will affect a large number of cases involving Fourth Amendment claims against police officers.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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